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No. 05-1363

# In the Supreme Court of the United States

W.R. GRACE & CO., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
SUE ELLEN WOOLDRIDGE
*Assistant Attorney General*
GREER S. GOLDMAN
JAMES D. FREEMAN
JOHN T. STAHR
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, authorizes the President to respond to the release of hazardous substances through "removal" or "remedial" actions and sets out criteria for conducting and recovering the costs of those two types of response. The question presented is whether the Environmental Protection Agency has properly characterized its response action at the Libby Asbestos Site in Libby, Montana as a "removal" action.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 429 F.3d 1224. The order of the district court granting partial summary judgment (Pet. App. 51a-70a) is reported at 280 F. Supp. 2d 1135. The order of the district court awarding response costs (Pet. App. 71a-138a) is reported at 280 F. Supp. 2d 1149.

### JURISDICTION

The judgment of the court of appeals was entered on December 1, 2005. On February 15, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 28, 2006, and the petition was filed on April 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

The United States sued petitioners W.R. Grace & Co., Kootenai Development Corporation, and W.R. Grace & Co.-Conn. (collectively Grace) to recover the government's ongoing costs of responding to the improper disposal of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, at the Libby Asbestos Site in Libby, Montana. The United States District Court for the District of Montana ruled that Grace is liable under CERCLA for government response costs at the site, Pet. App. 69a-70a, and awarded the government $54.5 million and other relief, *id.* at 136a-138a. The court of appeals affirmed, ruling, among other things, that the government properly characterized its response as a "removal" action. See *id.* at 1a-50a.

1. Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). That Act "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). It "both provides a mechanism for cleaning up hazardous-waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted), overruled on other grounds, *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup."

*Bestfoods*, 524 U.S. at 56 n.1 (quoting *Pennsylvania* v. *Union Gas Co.*, 491 U.S. at 21).

CERCLA provides the President, acting primarily through the Environmental Protection Agency (EPA), with several alternatives for cleaning up sites contaminated with hazardous substances.[1] As one alternative, EPA can itself undertake response actions, using the Hazardous Substances Superfund. See CERCLA § 104, 42 U.S.C. 9604 (2000 & Supp. III 2003); *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004). The United States can then recover EPA's response costs from responsible parties through a cost recovery action. See CERCLA § 107(a), 42 U.S.C. 9607(a); *Cooper Indus.*, 543 U.S. at 161.[2]

Section 107 of CERCLA "sets forth the scope of the liabilities that may be imposed on private parties and the defenses that they may assert." *Key Tronic*, 511 U.S. at 814. Under Section 107(a)(1)-(4)(A), responsible parties are liable for "all costs" of response incurred by the United States that are "not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(1)-(4)(A); see *Cooper Indus.*, 543 U.S. at 161. The national contingency plan (NCP), promulgated as a regulation pursuant to Section 105 of CERCLA, 42 U.S.C. 9605 (2000 & Supp. III 2003), prescribes requirements for selection and implementation of removal and remedial actions. 40 C.F.R. Pt. 300.

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[1] CERCLA grants authority to the President, who has delegated various powers to EPA. See Exec. Order No. 12,580, 3 C.F.R. 193 (1988).

[2] As another alternative, EPA can seek to require the responsible parties to undertake cleanup response actions, through an administrative order or judicial injunctive relief. CERCLA § 106(a), 42 U.S.C. 9606(a).

When the United States seeks to recover its response costs, "consistency with the NCP is presumed," and "[t]he potentially responsible party has the burden of proving inconsistency with the NCP." *United States* v. *Chapman*, 146 F.3d 1166, 1170-1171 (9th Cir. 1998); see *United States* v. *Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992), cert. denied, 510 U.S. 913 (1993). Section 113(j)(2) of CERCLA provides that courts "shall uphold [EPA's] decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law." 42 U.S.C. 9613(j)(2).

2. Grace's challenge in this case focuses on the meaning and significance of CERCLA's nomenclature for cleanup actions. CERCLA designates cleanup actions as either "removal" actions or "remedial" actions, and it designates either type of cleanup as a "response" action. CERCLA § 101(23), (24) and (25), 42 U.S.C. 9601 (23), (24) and (25).

a. Section 101(23) of CERCLA defines the terms "remove" and "removal" to include, among other things:

> the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which

> may otherwise result from a release or threat of release.

42 U.S.C. 9601(23). The NCP requirements for selecting and conducting a removal action are set forth at 40 C.F.R. 300.415.

The NCP requires that EPA consider eight factors in determining the appropriateness of a removal action, including, among other things, the actual or potential exposure to nearby human populations, actual or potential contamination of drinking water supplies, and high levels of hazardous substances in soils at or near the surface that may migrate. 40 C.F.R. 300.415(b)(2). If EPA determines, based on those factors, that there is a threat to the public health, it "may take any appropriate removal action to abate, prevent, minimize, stabilize, mitigate, or eliminate the release or the threat of release." 40 C.F.R. 300.415(b)(1).

Section 104(c)(1) of CERCLA provides generally that removal actions "shall not continue after $2,000,000 has been obligated for response actions or 12 months has elapsed from the date of initial response to a release or threatened release of hazardous substances." 42 U.S.C. 9604(c)(1); see 40 C.F.R. 300.415(b)(5). But Section 104(c)(1) and the NCP provide that those general limits may be exceeded if:

> (A) [EPA] finds that (i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a timely basis, or (B) [EPA] has determined the appropriate remedial actions pursuant to paragraph (2) of this subsection * * * or (C) continued response ac-

> tion is otherwise appropriate and consistent with the remedial action to be taken.

42 U.S.C. 9604(c)(1); see 40 C.F.R. 300.415(b)(5).

b. Section 101(24) of CERCLA defines the terms "remedy" and "remedial action" to include, among other things:

> those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

42 U.S.C. 9601(24) (footnote omitted). The NCP requirements for conducting remedial actions are generally set forth at 40 C.F.R. 300.430. The NCP prescribes additional and more detailed requirements for remedial actions in comparison to removal actions. Only those sites included on EPA's National Priorities List (NPL) are eligible for Superfund-financed remedial actions. 40 C.F.R. 300.425(b)(1). Each remedial action selected shall be cost-effective, as determined by balancing long-term effectiveness and permanence, reduction of toxicity, mobility, or volume through treatment, and short-term effectiveness. 40 C.F.R. 300.430(f)(1)(ii)(D).

3. This action arises from a governmental response action that EPA initiated to address a "truly extraordinary" situation in Libby, Montana, where a population of some 12,000 people has faced "ongoing, pervasive exposure to asbestos particles being released through documented exposure pathways." Pet. App. 4a. That exposure has created a substantial public health threat, docu-

mented by high rates of asbestos-related abnormalities and the fact that "people are sick and dying as a result of this continuing exposure." *Ibid.*

From the 1920s until 1990, Grace and its predecessors commercially mined and processed vermiculite ore located in the mountains about seven miles northeast of Libby. Those deposits include tremolite, a form of asbestos in the amphibole family. Grace trucked the processed ore to its Screening Plant and Export Plant, from which it was distributed nationwide. Grace also made asbestos-contaminated vermiculite available to employees and to local residents to take home for personal use in their homes, yards, and gardens. Pet. App. 8a-9a.

EPA's initial investigation of the Libby site in November 1999 documented a large number of current and historic cases of asbestos-related diseases around Libby and a high likelihood that significant amounts of asbestos remained. Pet. App. 9a-10a. EPA quickly broadened its investigation through extensive sampling and analysis, ultimately authorizing a removal action through a series of three action memoranda progressively broadening the scope of the removal. *Id.* at 11a.

a. On May 23, 2000, EPA issued an action memorandum which approved a removal for two areas known as the Screening Plant and the Export Plant. EPA determined that the "large concentrations of asbestos found" at the plants "in all media: soil, dust and airborne, clearly indicate that the human exposure pathway is complete." E.R. 211. EPA determined that surface soils at both plants contain high measured levels of asbestos scattered widely over the surface that can easily be tracked offsite and then, "through normal activities, such as vacuuming or other air disturbance, become respirable dust." E.R. 212. EPA found that rainfall and

snow melt can wash fibers "onto neighboring parcels, or into the Kootenai River," and that hot dry-weather conditions typical in Libby's summer months lead to soil migration, where Libby's "persistent inversion patterns" keep airborne contaminants "in the area for longer periods of time." E.R. 212-213.

EPA also determined, in accordance with Section 104(c)(1)(A) of CERCLA, that the conditions presented "an immediate threat to the local population" warranting a removal action exceeding $2 million in expenditures and 12 months in duration. Pet. App. 11a. EPA projected completing the action by the spring or summer of 2001, at a cost of no more than $5.8 million. *Ibid.*[3]

b. On July 20, 2001, EPA issued an action memorandum amendment, based on new information respecting the scope of contamination, expanding the removal action to address "newly identified risks" involving "high levels of amphibole asbestos" at six additional locations, including residential properties and three schools. Pet. App. 12a; E.R. 410. EPA determined that the "asbestos related deaths in Libby over the last two decades number in the hundreds," and there are "currently hundreds more who suffer from asbestos related illnesses." E.R. 426. EPA relied on medical screening conducted by the Agency for Toxic Substances and Disease Registry (ATSDR), which showed that "more than a thousand people will have asbestos related scarring in their lungs, or the pleural lining of their lungs," placing those people "at a much higher risk for developing lung cancer, mesothelioma, and/or fibrosis." *Ibid.* The ATSDR screening

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[3] Grace, with EPA's oversight, primarily conducted the work associated with the Export Plant under a unilateral administrative order that EPA issued in accordance with Section 106(a) of CERCLA. See Pet. App. 11a n.8.

"showed the widespread occurrence of lung abnormalities, not only among former Grace employees, but among their families, and the population at large in Libby." E.R. 414. EPA concluded that the "sheer magnitude of the medical impact in Libby dictates the need for an expedient and thorough response" and that the "direct and immediate steps should be taken to eliminate to the extent possible the exposure of people to this material." E.R. 426.

EPA also determined, under Section 104(c)(1)(A) of CERCLA, that there was an immediate threat warranting a removal exceeding $2 million in expenditures and 12 months in duration for the six additional properties and for completion of the Plant removal. EPA authorized a total removal ceiling of $20.1 million, with an estimated completion for most work by the winter of 2001-2002. Pet. App. 12a-13a.

c. On May 2, 2002, based again on new information respecting the extent of contamination, EPA issued another action memorandum amendment expanding the removal action to address contamination at hundreds of additional homes and businesses. Pet. App. 13a; E.R. 503, 511. EPA sampling detected amphibole asbestos in interior dust in 25% of the homes tested in Libby and asbestos in soils at 52% of the properties sampled. E.R. 511-512. At some homes, "vermiculite insulation is literally falling out into the living space from gaps around light fixtures and electrical switches." E.R. 511. EPA also found, again in accordance with Section 104(c)(1)(A), that the urgency of the threat warranted a removal beyond $2 million in expenditures and 12 months in duration. In addition, because the Libby site had been proposed for listing on the NPL, EPA found, under Section 104(c)(1)(C) of CERCLA, 42 U.S.C.

9604(c)(1)(C), that a removal beyond $2 million in expenditures and 12 months was appropriate and "consistent with a planned future remedial action." Pet. App. 13a & n.11.[4] EPA raised the ceiling for total project expenditures to approximately $55.6 million, and it estimated that the work would take some two to three construction seasons. *Ibid.*

4. While EPA's removal action was underway, the United States filed this action under Section 107(a)(1)-(4)(A) of CERCLA to recover its response costs, and the district court granted the United States partial summary judgment. See Pet. App. 51a-70a. The court ruled that EPA's determination to conduct a removal action complied with the governing NCP standards. *Id.* at 59a-60a. The court also ruled that EPA did not act arbitrarily or capriciously in invoking Section 104(c)(1)'s exemption from limits on the cost and duration of the removal action. *Id.* at 59a-62a. The court held that Grace was liable for certain documented costs, but concluded that, as to other costs, issues of material fact remained. *Id.* at 64a-65a.

The district court held a three-day bench trial on remaining cost issues. Pet. App. 14a. Grace stipulated as to the adequacy of documentation for $32,972,126 in removal costs, but contested other costs. The district

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[4] On October 24, 2002, EPA listed the Libby site on the National Priorities List, based on Montana's designation of the site as the State's "top priority" pursuant to Section 105(a)(8)(B) of CERCLA, 42 U.S.C. 9605(a)(8)(B). See 67 Fed. Reg. 65,317 (2002). That listing makes the site eligible for Superfund-financed remedial action. EPA continues to conduct a remedial investigation to determine the full extent of the contamination for the entire site, and it will then conduct a feasibility study to assess remedial alternatives and ultimately select a final remedial action.

court ultimately ruled that Grace was liable for all requested removal costs through December 31, 2001, totaling $54,527,081. *Id.* at 136a-137a. The court also granted a declaratory judgment as to liability for future costs. *Id.* at 137a-138a.

5. The court of appeals affirmed the district court's judgment. See Pet. App. 1a-50a. The court of appeals held that EPA did not act arbitrarily or capriciously in authorizing a removal action under 40 C.F.R. 300.415(b), see Pet. App. 17a, and that EPA's response action at the Libby site readily "falls within the bounds of a removal action." *Id.* at 41a.

The court of appeals noted that the relevant provisions of CERCLA governing the characterization of response actions are not clear in all respects, and the court considered whether EPA's characterizations of its actions were entitled to some measure of deference. See Pet. App. 18a-24a. The court concluded that EPA's construction of the statutory term "removal" was entitled, "at a minimum," to "a modified deference standard affording respect to the EPA's informal interpretations here." *Id.* at 21a (citing *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 487-488 (2004)). Applying that standard, the court concluded that "EPA's cleanup activities in Libby are properly categorized as a removal action." *Ibid.*

The court of appeals explained that EPA's "informal interpretations combined with the descriptions in the [NCP] provide a persuasive interpretation that removal actions encompass interim, partial time-sensitive responses taken to counter serious threats to public health." Pet. App. 37a-38a. The court also observed that "EPA's scientific basis for finding an immediate threat to the public health is thoroughly documented

over thousands of pages." *Id.* at 39a. The court ruled that EPA did not act arbitrarily or capriciously, in light of the "daunting realities" posed by the "widespread and pervasive asbestos contamination and the potential for further migration of asbestos fibers," to invoke Section 104(c)(1)'s exemptions to the generally applicable limitations on the cost and duration of removal actions. *Id.* at 43a, 46a. The court explained that EPA's need to invoke those exemptions in this case was "not surprising given the urgency, magnitude, and long-standing nature of the problem." *Id.* at 45a.

## ARGUMENT

In light of the "unique" and "truly extraordinary" public health threat posed by the Libby Absestos Site (Pet. App. 4a, 14a-15a), the court of appeals properly affirmed the district court's judgment that the United States is entitled to recover its costs of responding to the hazardous conditions at that site. Contrary to Grace's contentions, the court of appeals' decision does not conflict with any decision of this Court or of another court of appeals. That decision presents no recurring issue of national importance warranting this Court's review.

1. Grace contends (Pet. 13) that the court of appeals erred in concluding that all of EPA's abatement activities at issue in this case qualify as a removal action within the meaning of Section 101(23) of CERCLA, 42 U.S.C. 9601(23). Grace "does not deny that CERCLA authorizes the EPA to conduct removal actions to contain or abate immediate environmental hazards" (Pet. 15). Rather, in Grace's own words (Pet. 16):

> All Grace is saying here, thus, is that it is entitled to its day in court to try to prove that particular ele-

> ments of the $54 million requested by the Government * * * were not necessary to contain or abate an immediate environmental hazard, and thus not recoverable as "removal" costs under CERCLA.

But Grace has had "its day in court." Grace's petition, which simply seeks review of the court of appeals' application of context-dependent legal principles to the particular—and unusual—facts in this case, presents no issue warranting this Court's review.

Grace acknowledges that CERCLA subjects parties that are responsible for hazardous substance contamination to liability for the costs of "removal" and "remedial" actions, but imposes different procedural requirements for implementing and recovering the costs of those two types of response actions. See Pet. App. 8a, 14a-15a. The sole issue here is whether EPA's specific response activities at the Libby Asbestos Site "fall within the statutory limits of a removal action." *Id.* at 16a.

The court of appeals recognized—and Grace does not dispute—that Congress defined both "removal" and "remedial" actions in "sweeping" and "overlap[ping]" terms. Pet App. 24a-27a. The court concluded that the "normal tools of statutory interpretation" do not yield a categorical standard for distinguishing between removal and remedial actions, but instead require the exercise of judgment based on the facts of a particular case. *Id.* at 30a. The court of appeals also recognized that Congress gave EPA a central role in conducting response actions and applying those terms. The court correctly concluded, in accordance with this Court's decisions, *e.g.*, *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 485-488, that EPA's "rational[] * * * construction" of those particular terms "deserves our respect." Pet. App. 31a.

The court of appeals examined the particular circumstances that EPA faced in addressing the Libby site, including the "need of immediate action," Pet. App. 33a, the "sequence of activities," *ibid.*, and EPA's explanation of its actions, *id.* at 34a-39a, which involved "exceedingly complex" issues respecting risk assessment, testing methodology, and data analysis, *id.* at 39a. The court found that EPA had "thoroughly documented" the "scientific basis for finding an immediate threat to the public health. *Ibid.* Indeed, EPA's memoranda explaining its actions are based on an extensive administrative record that includes, among many other things, "comprehensive" toxicology reports "explaining the imminent and substantial endangerment to public health in Libby," EPA's "extensive responses" to Grace's "comments on the cleanup," and "lengthy findings" respecting medical testing of Libby residents. *Ibid.*; see *id.* at 39a-41a. The administrative record "also documents the concrete steps" that EPA undertook to abate those threats. *Id.* at 41a.

In light of CERCLA's "sweeping language" defining a removal, the "significant" deference due to EPA's expertise in administering the statute, and "the scope of the interim cleanup," the court of appeals properly "h[e]ld that the EPA's cleanup in Libby falls within the bounds of a removal action." Pet. App. 41a. The court of appeals correctly concluded that, in light of the widespread public health risk in this case, "EPA had no choice but to undertake an aggressive removal action of an expansive scope." *Id.* at 42a. The unanimous court of appeals' fact-based affirmance of the district court's judgment involves nothing more than the application of largely uncontroverted general principles to a "unique" public health threat that, while of vital importance to the

Libby residents, poses no legal issue of recurring importance warranting this Court's review.

While Grace cannot seriously controvert the public health risks created by its actions, it insists (Pet. 17) that the court of appeals erred because it treated the government's comprehensive attempt to abate the most immediate threats as a single removal action. See Pet. 23-25. Grace's view of what is properly included as part of the removal action is mistaken, and the court of appeals properly declined Grace's invitation to divide "EPA's single cohesive removal action into a myriad of fractured parts." Pet. App. 23a; see *id.* at 11a n.9, 24a, 42a. But more fundamentally for present purposes, the question of what activities in this case are properly part of the removal action is a factbound matter of no consequence beyond the confines of this particular cost recovery suit. Indeed, as Judge Bea noted in his concurrence, even if the specific activities that Grace challenges are evaluated separately, they would still properly constitute a part of the removal action at issue in this case. See *id.* at 48a-50a.

Grace engages in hyperbole in suggesting (Pet. 27) that the court of appeals has given EPA "*carte blanche*" to extend its removal powers beyond statutory bounds. To the contrary, the court of appeals emphasized the limited reach of its holding. It expressly stated that "there must be outer limits to removal actions" but that "EPA did not exceed these limits in this case." Pet. App. 42a. The court of appeals made clear that it understood its judicial obligation to determine whether

"EPA's characterization of a given response action accords with CERCLA, as we so determine here." *Ibid.*[5]

2. Grace mistakenly asserts (Pet. 17-21) that the court of appeals' decision conflicts with decisions of the Eighth and Tenth Circuits. Grace specifically contends (Pet. 20) that the conflict arises from the court of appeals' determination to address the Libby response as a single removal action rather than on an item-by-item basis, which, in Grace's view, "cannot possibly be squared" with *Minnesota* v. *Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019 (8th Cir. 1998), and *Public Service Co.* v. *Gates Rubber Co.*, 175 F.3d 1177 (10th Cir. 1999). Those decisions, however, address no such issue and present distinctly different circumstances.

In *Abrams Metals*, Minnesota appealed from a summary judgment that its cleanup actions under CERCLA constituted a remedial action rather than a removal action. The Eighth Circuit rejected Minnesota's request for a vacatur and remand to allow further factual development. 155 F.3d at 1024. The court of appeals did not hold that the response action should be divided, as Grace advocates here, into a line-item determination of whether each separate activity constitutes a removal or remedial action. Rather, the court held that the entire response action constituted a remedial action. *Ibid.* As Grace correctly notes (Pet. 18), the Eighth Circuit did remand to give the defendants in that case the opportu-

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[5] Grace's mantra that it has been denied its "day in court" (Pet. 16, 20, 22, 23 n.3) cannot be reconciled with the extensive opportunities it has already had to convince the district court and the court of appeals that EPA's response activities did not constitute a removal action. Grace was free to contest any aspect of the record on summary judgment. The district court and the court of appeals carefully considered the arguments that Grace made and properly rejected them.

nity to demonstrate that particular costs were inconsistent with the NCP. 155 F.3d at 1026. But that remand addressed only whether particular costs were inconsistent with the NCP's remedial action requirements, and not whether particular costs should be considered as being for removal or remedial actions. *Ibid.* (defendants may prove that inconsistency with the NCP "caused the State to incur unreasonable or unnecessary response costs in implementing even an appropriate remedial action").

Furthermore, even as to the Eighth Circuit's holding that the response was a remedial action, the factual circumstances differ substantially. In *Abrams*, the State had never even "made the determination required by § 300.415(b) of the NCP" to approve a removal action. 155 F.3d at 1024.[6] The Eighth Circuit also noted the "leisurely manner" in which the State proceeded, allowing some four years to pass from the site assessment revealing hazardous lead concentrations until initiating the response action. *Ibid.* Here, by contrast, EPA approved a removal action under 40 C.F.R. 300.415(b) in "extensively documented" findings, the court of appeals held that this decision was not arbitrary and capricious, and petitioners do not seek further review of that holding. See Pet. App. 16a-17a (citing 42 U.S.C. 9613(j)(2)). EPA also acted quickly to address the extraordinary contamination in Libby, conducting an initial site visit in November 1999, initiating a larger rapid-scale investigation from December 1999 through April 2000 in which it

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[6] The NCP, as discussed (p. 5, *supra*), provides, with respect to the approval of removal actions, that the government "may take any appropriate removal action" when it determines based on the eight factors set forth in 40 C.F.R. 300.415(b)(2) that there is a threat to the public health and welfare.

collected over 2000 samples, and issuing its first action memorandum on May 23, 2000, authorizing a removal action. See *id.* at 9a-11a, 53a. In turn, as newly discovered health risks became known, EPA acted quickly to expand the removal action to address human exposure pathways at numerous other locations. See pp. 7-9, *supra.*

Similarly, in *Gates Rubber Co.*, the Tenth Circuit held only that the relevant response action in that case was a remedial action. 175 F.3d at 1184. The court did not rule that an item-by-item analysis should be conducted in distinguishing between removal and remedial actions. In addition, the action in *Gates Rubber Co.* was brought by a private landowner who had conducted the response action, and there was no determination by EPA or the State of Colorado to conduct a removal action under 40 C.F.R. 300.415(b). Rather, the landowner's consultant prepared a report entitled "Proposal for Remedial Action," the landowner studied the site over a two-year period before taking action, and the landowner "intended to remediate the site and sell it and recoup its cleanup costs." 175 F.3d at 1184. Thus, *Gates Rubber Co.* also presents no conflict and no basis for further review.

3. Petitioner's assertion (Pet. 27) that further review is justified because the court of appeals purportedly expressed "open confusion" as to this Court's deference standards is unpersuasive. The court of appeals correctly recognized that this Court has not definitively resolved the scope of deference to be accorded to differing forms of informal agency interpretation. See Pet. App. 19a-21a (discussing the "interplay" between *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), and other de-

cisions of this Court). But this case does not present a useful vehicle for exploring that issue, because the degree of deference does not have controlling significance here. As the court of appeals expressly stated, under either "modified deference or full *Chevron* deference, the result would be the same: The EPA's cleanup activities in Libby are properly characterized as a removal action." *Id.* at 21a. Indeed, the same result would obtain if the agency received no deference at all. EPA's characterization of the Libby response as a removal "is amply supported by the administrative record." *Id.* at 42a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

SUE ELLEN WOOLDRIDGE
*Assistant Attorney General*

GREER S. GOLDMAN
JAMES D. FREEMAN
JOHN T. STAHR
*Attorneys*

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